

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
JUNE 8, 2005 Session

**IN THE MATTER OF THE ESTATE OF NOAH THOMAS GREENE,
DECEASED
CECILIA GREENE v. THE ESTATE OF NOAH THOMAS GREENE**

**Direct Appeal from the Probate Court for Shelby County
No. C-9176 Donn Southern, Judge**

No. W2004-02910-COA-R3-CV - Filed November 7, 2005

In this appeal, we are asked to review the probate court's decision regarding a motion by a decedent's estate to hold the decedent's wife liable for conversion of an automobile. The decedent's wife asserted that the automobile was a gift inter vivos from her late husband. The probate court determined that ownership of the automobile rested with the decedent at the time of his death. The decedent's wife filed an appeal to this Court. We affirm.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Probate Court Affirmed

ALAN E. HIGHERS, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and HOLLY M. KIRBY, J., joined.

James S. Strickland, Jr., Memphis, TN, for Appellant

Edward T. Autry, Memphis, TN, for Appellee

OPINION

I. FACTS & PROCEDURAL HISTORY

Mrs. Cecilia Greene ("Wife" or "Appellant") and Noah Thomas Greene ("Decedent") married on April 19, 1962. Approximately seventeen years later, the couple separated but never divorced. Sometime during the month of August 1999, Wife moved in with her daughter, Tanya Greene ("Daughter"), to care for Daughter's children. Wife did so until July 2000, when she moved out. According to Wife, during the month of January 2000, Daughter delivered a 2000 Honda Accord automobile (the "Accord") to Wife after visiting Decedent in Memphis. Daughter stated that the Accord was a gift from Decedent.

On December 24, 2002, Decedent died. On January 14, 2004, Wife petitioned the probate court to appoint her Administratrix since Daughter, the personal representative listed in Decedent's last will and testament, had not petitioned for probate of Decedent's estate ("Estate" or "Appellee"). On January 20, 2004, Wife petitioned the probate court for her share of personal property held in the Estate, year's support allowance, elective share, homestead allowance, and to partition the real property held in the Estate. On February 4, 2004, Daughter submitted a petition for probate of Decedent's attested will. On February 12, 2004, the probate court appointed Daughter and Edward Autry as co-personal representatives for the Estate. Wife and the Estate subsequently reached a settlement agreement to dispose of Wife's claims for her share of the Decedent's personal property, year's support allowance, elective share, homestead allowance, and to partition the real property held in the Estate. According to Wife, although the parties discussed the ownership of the Accord during the mediation, the parties did not include the Accord in the final settlement agreement. Subsequently, the Estate filed a motion to hold Wife liable for conversion of the Accord.

The probate court conducted a hearing on the Estate's motion on October 4, 2004. At the hearing, Wife attempted to prove that ownership of the Accord passed to her by inter vivos gift from Decedent. At the conclusion of the hearing, the probate court orally ruled that the record owner of the Accord at the time of Decedent's death was Decedent, stating as follows:

I'll be truthful, it's kind of a close case in the Court's mind. . . . I know that there's evidence to support each position. But I do go back – keep looking back at the Affidavit – the settlement agreement and quite candidly, it's just inconceivable to me that the two vehicles would be addressed as going to Ms. Cecilia Greene and that there would be no reference to the Honda.

The Honda was not in her possession. She wasn't driving it, she wasn't using it apparently, and had not been for some time. Seems to me she must have known that that vehicle which had been purchased by Mr. Greene needed to be addressed if she expected to receive it. And I just cannot – I know that something you said about the title, Department of Safety not being perfect, I know that they sometimes changed – they will change the title sometimes on an indication that – I won't go into that.

After the death of an owner, there are ways in which that – they do transfer the title. I do find it interesting that the State of Tennessee's records show the – show a death certificate as part of their records. You wonder why that – if it were in her name, why would it be necessary to have the – her husband's death certificate in there.

Based on all the circumstances, I'm just not convinced and *I think the greater weight of the evidence is in favor of the position that that*

vehicle, the Honda vehicle, should be and is part of the estate of the decedent. And that's going to be the ruling of this Court.

(emphasis added) On October 14, 2004, the probate court entered a final order stating that Decedent solely owned the Accord at the time of his death and ordered that Appellant endorse the title of the Accord back to the Appellee.

II. ISSUES PRESENTED

Appellant filed a timely notice of appeal to this Court presenting the following issue for review:

1. Whether Decedent transferred ownership of the Accord by inter vivos gift to Appellant. Appellee has presented the following additional issues for review:
2. Whether the probate court erred by admitting testimony offered by Appellant over Appellee's hearsay objection regarding statements made by Daughter;
3. Whether the probate court erred by admitting testimony offered by Appellant regarding statements made by Decedent concerning the Accord over Appellee's hearsay objection and Appellee's objection that such testimony was in violation of the Dead Man's Statute, codified at section 24-1-203 of the Tennessee Code; and
4. Whether Appellant's appeal is frivolous.

For the following reasons, we affirm the decision of the probate court and find that this appeal is not frivolous.

III. STANDARD OF REVIEW

Since this appeal stems from a hearing conducted without a jury, we must review the findings of fact from the trial court under a *de novo* standard, presuming any finding of fact to be correct unless the preponderance of evidence is otherwise. Tenn. R. App. P. 13(d) (2005); *see Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1996) (citing Tenn. R. App. P. 13(d)). In doing so, we are mindful of the following:

Unlike appellate courts, trial courts are able to observe witnesses as they testify and to assess their demeanor, which best situates trial judges to evaluate witness credibility. *See State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990); *Bowman v. Bowman*, 836 S.W.2d 563, 566 (Tenn. Ct. App. 1991). Thus, trial courts are in the most favorable position to resolve factual disputes hinging on credibility determinations. *See Tenn-Tex Props. v. Brownell-Electro, Inc.*, 778 S.W.2d 423, 425-26 (Tenn. 1989); *Mitchell v. Archibald*, 971 S.W.2d 25, 29 (Tenn. Ct. App. 1998). Accordingly, appellate courts will not re-evaluate a trial judge's assessment of witness credibility absent clear and convincing evidence to the contrary. *See Humphrey v.*

David Witherspoon, Inc., 734 S.W.2d 315, 315-16 (Tenn. 1987);
Bingham v. Dyersburg Fabrics, Co., Inc., 567 S.W.2d 169, 170
(Tenn. 1978).

Wells v. Tenn. Bd. of Regents, 9 S.W.3d 779, 783 (Tenn. 1999). Further, we shall review any conclusions of law by the trial court under a *de novo* standard with no presumption of correctness. *Union Carbide Co. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993).

IV. DISCUSSION

A. Ownership of the Accord

On appeal, Appellant claims that the probate court erred when it did not find that Appellant received the Accord as a gift inter vivos from Decedent because there was ample evidence in the record to support a finding that a gift had been made by Decedent to Appellant.

Two elements must be present in order to find a properly executed gift inter vivos. *Arnoult v. Griffin*, 490 S.W.2d 701, 710 (Tenn. Ct. App. 1972) (citing *Dodson v. Matthews*, 117 S.W.2d 969 (Tenn. 1938)). First, the donor must have the present intent to make a gift to the donee. *Id.* Intent is determined from the totality of the circumstances. *Id.* Second, the donor must deliver the gift to the donee. *Id.* For delivery to occur, the donor must “surrender complete dominion and control of the gift” to the donee. *Pamplin v. Satterfield*, 265 S.W.2d 886, 888 (Tenn. 1954). To prove delivery, the donee must show “evidence free from personal interest and not equivocal in character that the property claimed was delivered to donee during the donor’s life” *Atchley v. Rimmer*, 255 S.W. 366, 369 (Tenn. 1923). “The testimony of the beneficiary of an inter vivos gift is not sufficient to establish the gift.” *Union Planters v. Shepard*, No. W2002-01188-COA-R3-CV, 2003 Tenn. App. LEXIS 498, at *12 (Tenn. Ct. App. July 14, 2003) (citing *Atchley*, 255 S.W. at 369). Mere possession of the property at issue is not enough. *Id.* The donee must prove both intent and delivery by clear and convincing evidence. *Parsley v. Harlan*, 702 S.W.2d 166, 173 (Tenn. Ct. App. 1985) (citing *Ingram v. Phillips*, 684 S.W.2d 954 (Tenn. Ct. App. 1984)).

At trial, Appellant, as the donee, had the burden of proving that she acquired the Accord as an inter vivos gift. To prove her claim that the Accord was a gift, Appellant presented her oral testimony; the oral testimony of Malcolm Greene; an automobile title dated April 17, 2003 listing Appellant as the owner; an automobile title dated January 21, 2004 listing Appellant as the owner; and a statement from Geico Insurance Company reporting that insurance had been carried on the Accord in the name of Appellant from January 16, 2000 until April 9, 2004. To rebut this, Appellee presented a duplicate title issued on December 8, 2003, showing Decedent as the owner and Appellant as the subsequent purchaser as well as a settlement agreement disposing of all claims by Appellant against Appellee that did not include the Accord. Applying what appears to be a preponderance of the evidence standard, the probate court found it to be a “close case” but that the evidence weighed in favor of a finding that Decedent owned the Accord at his death.

While the probate court applied an incorrect legal standard when determining if Appellant carried her burden of proving an inter vivos gift by Decedent, we must still affirm the probate court's ruling on this issue. The probate court held that Appellant failed to prove the existence of an inter vivos gift by even a preponderance of the evidence. Thus, the probate court would have necessarily reached the same result if it applied the correct legal standard. Based upon our independent review of the record, we do not find clear and convincing evidence to support finding that Decedent intended an inter vivos gift of the Accord. During the trial, Appellant presented testimony from only one witness that related to either donative intent or delivery, her own.¹ The probate court was in the best position to determine the credibility of Appellant. From his decision, it follows that the probate court did not find Appellant to be credible. Appellant has not shown that there is clear and convincing evidence to warrant a different finding. *See Wells v. Tenn. Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999) (citing *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315, 315-16 (Tenn. 1987); *Bingham v. Dyersburg Fabrics, Co., Inc.*, 567 S.W.2d 169, 170 (Tenn. 1978)).

Additionally, the automobile titles presented at trial conflict as to who owned the Accord at the death of Decedent. While two titles state that Appellant owned the Accord at the time of Decedent's death, the other states that Decedent owned the Accord at the time of his death. The probate court noted the conflicting titles and expressed doubt about which title constituted the official title in its order. The probate court also questioned the inclusion of Decedent's death certificate in the chain of title. Finally, Appellant presented a statement from Geico Insurance Company reporting that Appellant carried insurance in her name on the Accord. Nothing in the statement shows donative intent or delivery. It merely lists Appellant as an insured on the vehicle.

When faced with doubt as to any evidence presented to establish a gift, any "[d]oubts must be resolved against the gift." *Pamplin*, 265 S.W.2d at 888. Further, "the courts will closely scrutinize the evidence by which is sought to establish a gift after the donor's death." *Am. Nat. Bank v. Robinson*, 184 S.W.2d 393, 396 (Tenn. Ct. App. 1944) (citing *Atchley*, 255 S.W. 366; *Chandler v. Roddy*, 43 S.W.2d 397 (Tenn. 1931); *Allen v. Hays*, 201 S.W. 135 (Tenn. 1917); *Ferry v. Bryant*, 93 S.W.2d 344 (Tenn. Ct. App. 1935); *Dodson v. Matthews*, 117 S.W.2d 969 (Tenn. Ct. App. 1937); *Miller v. Proctor*, 145 S.W.2d 807 (Tenn. Ct. App. 1940)).

Accordingly, we affirm the decision of the probate court. Thus, we need not reach the other issues raised by Appellee concerning certain statements made at trial.

B. Frivolous Appeal

In its brief, Appellee has petitioned this Court for an award of damages for frivolous appeal predicated on section 27-1-122 of the Tennessee Code. Based upon the evidence in the record, the

¹Appellant also presented the oral testimony of Malcolm Greene. He did not testify, however, as to any matter that would show donative intent or delivery. His testimony addressed the facts surrounding the acquisition of titles by Appellant.

briefs on appeal, and the oral arguments, we conclude that this appeal is not frivolous and do not award damages.

When it appears to this Court that an appeal is “frivolous or taken solely for delay, [we] may, . . . upon motion of a party . . . , award just damages against the appellant, which may include, but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.” Tenn. Code Ann. § 27-1-122 (2005). “A frivolous appeal is one that is devoid of merit, . . . or one that has no reasonable chance of succeeding. . . .” *Young v. Ballow*, 130 S.W.3d 59, 67 (Tenn. Ct. App. 2003) (citations omitted). For an appeal to have no reasonable chance of success, it must “require revolutionary changes in fundamental standards of appellate review” for this Court to reverse the trial court’s decision. *Davis v. Gulf Ins. Group*, 546 S.W.2d 583, 586 (Tenn. 1977). Additionally, the appeal must “cite[] no evidence or rule of law which would entitle them to a reversal or other relief from the decree of the trial court.” *Wells v. Sentry Ins. Co.*, 834 S.W.2d 935, 938 (Tenn. 1992) (citing *Kilpatrick v. Emerson Elec. Co.*, 685 S.W.2d 630, 632 (Tenn. 1985); *Lambert v. Travelers Ins. Co.*, 626 S.W.2d 265, 267 (Tenn. 1981)). However, “[g]enuine disagreements regarding the facts or conclusions to be drawn from [sic] the facts provide a sufficient basis for an appeal and provide an appropriate basis for declining to award frivolous appeal damages.” *In re Armster*, No. M2000-00776-COA-R3-CV, 2001 Tenn. App. LEXIS 797, at *56 (Tenn. Ct. App. Oct. 25, 2001) (citing *Anderson v. Dean Truck Line, Inc.*, 682 S.W.2d 900, 902 (Tenn. 1984); *Liberty Mut. Ins. Co. v. Taylor*, 590 S.W.2d 920, 922-23 (Tenn. 1979)). “Determining whether to award these damages is a discretionary decision.” *Young*, 130 S.W.3d at 67 (citing *Banks v. St. Francis Hosp.*, 697 S.W.2d 340, 343 (Tenn. 1985)).

It appears to this Court that Appellant’s basis for appeal is a genuine disagreement over the conclusions drawn by the probate court from the facts. Accordingly, we find that this appeal is not frivolous.

V. CONCLUSION

For the reasons set forth herein, we affirm the probate court’s decision that the ownership of the Accord rested with Decedent at the time of his death. Appellee’s request for damages based upon a frivolous appeal is denied. Costs of this appeal are taxed to Appellant, Cecilia Greene, and her surety, for which execution may issue if necessary.

ALAN E. HIGHERS, JUDGE